No. 76-930

In the Supreme Court of the United States

OCTOBER TERM, 1977

DIXY LEE RAY, GOVERNOR OF THE STATE OF WASHINGTON, ET AL., APPELLANTS

v.

ATLANTIC RICHFIELD COMPANY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

WADE H. McCREE, Jr.,
Solicitor General,
WILLIAM F. SHEEHAN, III,
Assistant to the Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This submission is made in response to the Court's invitation to the Solicitor General to file a brief on behalf of the United States as *amicus curiae*.

QUESTION PRESENTED

The United States will discuss the question whether Chapter 125 of the 1975 Laws of Washington is preempted by the Ports and Waterways Safety Act of 1972, and other federal statutes.

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STATEMENT

Atlantic Richfield Company ("ARCO") brought this suit in the United States District Court for the Western District of Washington, naming as defendants the Governor and other officials of the State of Washington and seeking to enjoin enforcement of Chapter 125 of the 1975 Laws of Washington, Revised Code of Washington Annotated, § 88.16.170 *et seq.* (1976) (A. 97–101).[1] That statute requires all oil tankers—American or foreign flag (A. 44)—of 40,000 or more deadweight tons ("DWT") that do not conform to certain design and construction standards to take on tug escorts when navigating Puget Sound (Section 3(2)); it requires, in addition, that oil tankers of 50,000 or more DWT take on a state-licensed pilot when navigating the Sound (Section 2); and it prohibits oil tankers of more than 125,000 DWT from entering the Sound under any circumstances (Section 3(1)).

1. In 1971 ARCO built and began operating an oil processing refinery at Cherry Point in Puget Sound (A. 41, 44–45). The crude oil processed at the refinery has been delivered principally by pipeline from Canada and by tankers from the Persian Gulf (A. 41, 45). Ninety-five of the 105 tankers that have called at

[1] After the complaint was filed, Seatrain Lines, Inc., intervened as a party plaintiff; several environmental organizations and the Prosecuting Attorney for King County, Washington, intervened as parties defendant. A pretrial order entered April 6, 1976, embodies the parties' stipulation of uncontested facts and issues of law presented (A. 39–359).

Cherry Point have been in excess of 40,000 DWT (A. 46). Before the effective date of Chapter 125, fifteen tankers in excess of 125,000 DWT called at Cherry Point (A. 46–47); no tanker of that size has called at Cherry Point since Chapter 125 went into effect (A. 44).

Now that the Trans-Alaska Pipeline has been completed, ARCO intends to transport oil from the terminus of that pipeline, at Valdez, Alaska, by tanker to Cherry Point (A. 45).[2] ARCO plans to use seven vessels of between 50,000 and 120,000 DWT, and two 150,000 DWT vessels that are under construction, for that purpose (A. 50).[3]

ARCO has always used state-licensed pilots on all tankers entering Puget Sound (A. 66). Its use of tug escorts prior to enactment of Chapter 125 was occasional (A. 67). Since that time ARCO has complied with the requirements of Chapter 125; in the district court the parties stipulated that the average cost per vessel to ARCO of complying with the tug escort re-

[2] All of the Alaska oil will be delivered by tanker from Valdez to West Coast ports. Fifteen percent is slated for Puget Sound, 40 percent for San Francisco, and 45 percent for Long Beach (A. 49). The amount of oil involved is expected to be three times the volume of oil transported by tanker between domestic ports in 1974 (A. 49). At Valdez, four docking facilities are under construction, each of which will be capable of accommodating tankers of 250,000 DWT (A. 49). Approximately one-third of the tankers expected to participate in the Alaska trade will be in excess of 125,000 DWT (A. 50).

[3] ARCO has also contracted to build three other tankers, two of 151,000 DWT and the third of 120,000 DWT, to be used in the foreign trade (A. 54).

quirement has been approximately $7,500 and that at that average cost ARCO's annual cost of compliance would be approximately $277,500, or about one cent per barrel of oil delivered by tanker to Cherry Point (A. 68).[4]

2. Seatrain Lines, Inc., owns or charters 12 tanker vessels in domestic and foreign commerce (A. 41, 53). Four of those vessels are foreign flag and exceed 125,000 DWT: six are less than 40,000 DWT and therefore are not affected by Chapter 125 (A. 53). No Seatrain tanker has entered Puget Sound since the enactment of Chapter 125 (A. 44).

Through a wholly owned subsidiary corporation Seatrain operates a shipbuilding facility at the Brooklyn Navy Yard in New York City, where it has recently constructed or is constructing four 225,000 DWT tankers (A. 41, 54–55, 61). With respect to each of those tankers Seatrain has received federal subsidies under the Merchant Marine Act of 1936, 49 Stat. 1985, as amended, 46 U.S.C. 1101 *et seq.* (A. 55, 61–62).

3. ARCO and Seatrain sought to enjoin enforcement of Chapter 125 on the grounds that it is preempted by several federal statutes (A. 22–29)—especially the Ports and Waterways Safety Act of 1972

[4] A barrel of crude oil equals 42 U.S. gallons (A. 45 n. 3). Approximately 7.2 barrels (302 gallons) comprise one long ton (2,240 pounds), in which deadweight tonnage is measured (A. 43 n. 1). Thus, a tanker of 100,000 DWT could carry 720,000 barrels of oil and would incur a tug escort fee of $7,500.

("PWSA")[5]—and imposes an impermissible burden on interstate and foreign commerce (A. 29–30). The three-judge district court upheld ARCO's claims of preemption under the Supremacy Clause without reaching the issue under the Commerce Clause. The court ruled that Chapter 125 is completely preempted by the PWSA (J.S. App. C, pp. 5a–12a) and it enjoined the defendant officials from enforcing or attempting to enforce the state statute in any respect (J.S. App. B, pp. 3a–4a). On January 10, 1977, this Court granted appellants' application for a stay of the injunction pending final disposition of their appeal (A. 373).

INTRODUCTION AND SUMMARY

1. The Ports and Waterways Safety Act of 1972 ("PWSA") is designed to protect the navigable waters of the United States, and the land adjacent thereto, from damage resulting from maritime accidents. Title I of PWSA, codified at 33 U.S.C. (Supp. V) 1221 *et seq.*, is principally concerned with the prevention of vessel collisions and the avoidance and containment of shoreside accidents. The purpose of Title I is "to prevent damage to, or the destruction or loss of any vessel, bridge, or other structure on or in the navigable waters of the United States, or any land structure or shore area immediately adjacent to those waters; and to protect the navigable waters and the resources therein from environmental harm resulting from vessel or structure damage, destruction, or

[5] 86 Stat. 424, 427, codified at 33 U.S.C. (Supp. V) 1221 *et seq.* and 46 U.S.C. (Supp. V) 391a *et seq.*

loss * * *." 33 U.S.C. (Supp. V) 1221. Title II of PWSA, codified at 46 U.S.C. (Supp. V) 391a *et seq.*, is principally concerned with minimum design and construction requirements for oil tankers plying the navigable waters of the United States. Congress' "Statement of Policy" in Title II declares "[t]hat the carriage by vessels of certain cargoes in bulk creates substantial hazards to life, property, the navigable waters of the United States * * * and the resources contained therein and of the adjoining land * * *" necessitating the establishment, *inter alia,* of minimum standards of design and construction of such vessels. 46 U.S.C. (Supp. V) 391a.

Title I states that, in ports and other waters "subject to congested vessel traffic," the Secretary of the Department in which the Coast Guard is operating (now the Department of Transportation) may establish a vessel traffic system and require vessels to install "electronic or other devices" necessary to comply with that system (33 U.S.C. (Supp. V) (1221(1) and (2)). In areas or at times that the Secretary determines pose "especially hazardous" conditions, the Secretary may also "control" vessel traffic by various means: he may specify the timing and routing of vessel traffic; he may impose vessel size and speed limitations, as well as "vessel operating conditions"; and he may restrict vessel operation "to vessels which have particular operating characteristics and capabilities" necessary for safe operation under the circumstances (33 U.S.C. (Supp. V) 1221(3)). In addition, the Secretary may establish across-the-board requirements regarding the handling and stowage of explosives or other dangerous articles (33 U.S.C. (Supp. V) 1221(6)), and, when necessary to prevent damage to or by a particular vessel, he may direct that the vessel be anchored or moved (33 U.S.C. (Supp. V) 1221(4)).

Title I also confers upon the Secretary limited authority to require pilots on vessels engaged in the foreign trades. That authority may be exercised only "where a pilot is not otherwise required by State law to be on board" and only "until the State * * * establishes a requirement for a pilot in [the] area or under the circumstances involved" (33 U.S.C. (Supp. V) 1221(5)).[6]

Title II amends the Tank Vessel Act,[7] which, as enacted in 1936, "provided the Coast Guard comprehensive authority to issue regulations with respect to certain vessels having on board inflammable or combustible liquid cargoes in order to secure effective provision 'against the hazards of life and property' " (S. Rep. No. 92–724, 92d Cong., 2d Sess. 21 (1972)

[6] As to shoreside structures, Title I provides that the Secretary may prescribe "minimum safety equipment requirements" to assure adequate protection from fire, explosions, and other serious accidents (33 U.S.C. (Supp. V) 1221(7)). Nothing in Title I prevents a state "from prescribing for structures only higher safety equipment requirements" than those set by the Secretary (33 U.S.C. (Supp. V) 1222(b)).

[7] Rev. Stat. Section 4417, as amended, 46 U.S.C. 391a *et seq.*

(hereinafter "S. Rep.")).[8] Title II was added by the Senate to supplement the vessel traffic system scheme of Title I "by also requiring that vessels be built to higher standards of design and construction, and subject to higher standards in their operation" (S. Rep., *supra,* at pp. 7–8). Thus, while Title I "can be likened to providing safer surface highways and traffic controls for automobiles," Title II can be "likened to providing safer automobiles to transit those highways" (*id.* at 9–10).

To provide both for vessel safety and for protection of the marine environment, the Secretary is directed by Title II to establish "rules and regulations as may be necessary" with respect to the design, construction and maintenance of all oil tankers, American or foreign flag, entering our navigable waters (46 U.S.C. (Supp. V) 391a(3)). The power conferred is broad: the Secretary's regulations may prescribe standards for vessel superstructures, hulls, cargo compartments, fittings and appliances, propulsive machinery, boilers, and the materials used in any of the foregoing; for the manner of handling or stowing oil and the machinery used; for equipment for the protection of life and for the prevention and mitigation of damages

[8] Although Congress believed that the Tank Vessel Act itself arguably was broad enough "to encompass promulgation of standards for the protection of the marine environment," it noted that "environmental protection has not been an identified objective of" that Act and accordingly passed Title II in order to provide "a specific mandate by the Congress for rules and regulations also directed to protection of the marine environment" (S. Rep., *supra,* at p. 21).

to the marine environment; and for the manning of oil tankers and the operation itself of such vessels. *Ibid.* The design and construction requirements are to "include but not be limited to standards to improve vessel maneuvering and stopping ability and otherwise reduce the possibility of collision, grounding, or other accident, to reduce cargo loss following collision, grounding, or other accident, and to reduce damage to the marine environment by normal vessel operations such as ballasting and deballasting, cargo handling, and other activities" (46 U.S.C. (Supp. V) 391a(7)).

Both American and foreign vessels are required to comply with the regulations issued under both Title I and Title II (33 U.S.C. (Supp. V) 1221; 46 U.S.C. (Supp. V) 391a(5) and (6)), upon pain of civil and criminal penalties (33 U.S.C. (Supp. V) 1226 and 1227; 46 U.S.C. (Supp. V) 391a(11)).[9] In addition, the Secretary is authorized to "deny entry into the navigable waters of the United States to any vessel not in compliance" with his regulations under Title II (46 U.S.C. (Supp. V) 391a(13)).

2. In determining whether Chapter 125 is preempted by the PWSA, "[t]he first inquiry" is whether Congress "has prohibited state regulation of

[9] Acting under Title I, the Secretary has established a vessel traffic system for Puget Sound. 33 C.F.R. Part 161, Subpart B. That system provides, *inter alia*, for separated traffic lanes and requires that vessels in the Sound communicate frequently with the Coast Guard's Vessel Traffic Center in Seattle. The regulations promulgated by the Secretary under Title II are discussed at pp. 21–22 note 21, *infra.*

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the particular aspects of commerce involved." *Jones* v. *Rath Packing Co.*, No. 75–1053, decided March 29, 1977, slip op. 4. Since Chapter 125 represents an exercise by the State of Washington of its police power, the Court must " 'start with the assumption that the historic police powers of the State[] were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.' " Slip op. 4, quoting from *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218, 230. That "clear and manifest purpose" may be found "explicitly stated in the statute's language or implicitly contained in its structure and purpose." Slip op. 4.

Even absent a congressional determination in the PWSA to oust the states from the field of oil tanker regulation, any aspect of Washington's Tanker Law that conflicts with the PWSA must fall. Slip op. 4–5. The conflict need not be such as to make compliance with both statutes impossible. The state law is overridden if in any respect it " 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " Slip op. 5, quoting from *Hines* v. *Davidowitz*, 312 U.S. 52, 67. In determining whether a fatal conflict exists, no less than in determining whether Congress has expressed an intent to occupy the field, the Court must give due regard to "the federal-state balance" (*United States* v. *Rass*, 404 U.S. 336, 349); whenever possible, "the proper approach is to reconcile 'the operation of both statutory schemes with one another rather than holding [the state scheme] completely ousted.' " *Merrill Lynch, Pierce, Fenner & Smith* v. *Ware*, 414 U.S. 117, 127, quoting from *Silver* v. *New York Stock Exchange*, 373 U.S. 341, 357. See *De Canas* v. *Bica*, 424 U.S. 351, 357–358 n. 5.

Finally, even though the PWSA contemplates comprehensive federal regulation of both the physical characteristics and actual operation of oil tankers in American waters, it does not necessarily follow that there is no room left for complementary state legislation. While in a particular case "the pervasive nature of the scheme of federal regulation [may lead the Court] to conclude that there is pre-emption" (*City of Burbank* v. *Lockheed Air Terminal, Inc.*, 411 U.S. 624, 633), "[t]he fact that the federal regulations [are] numerous and elaborate does not extend them beyond the boundary they established" (*Kelly* v. *Washington*, 302 U.S. 1, 13). The Court has often recognized that even a comprehensive federal regime does not automatically preclude state action in the same field. *E.g.*, *De Canas* v. *Bica*, *supra*, 424 U.S. at 359; *Askew* v. *American Waterways Operators, Inc.*, 411 U.S. 325, 330, 341–342. "Given the complexity of the matter addressed by Congress in [the PWSA], a detailed statutory scheme was both likely and appropriate, completely apart from any questions

of pre-emptive intent." *New York Department of Social Services* v. *Dublino*, 413 U.S. 405, 415. Ultimately "each case turns on the peculiarities and special features of the federal regulatory scheme in question" (*City of Burbank* v. *Lockheed Air Terminal, Inc., supra,* 411 U.S. at 638) and of the state statute said to be preempted.

3. Applying the foregoing principles to the present controversy, we conclude, first, that Chapter 125's requirement that vessels exceeding 50,000 DWT take on a state-licensed pilot is not preempted by the PWSA insofar as that requirement applies to registered vessels engaged in the foreign trade. On the contrary, Section 101(5) of the PWSA, 33 U.S.C. (Supp. V) 1221(5), authorizes the Secretary to require pilots on vessels "engaged in the foreign trades" only in the absence of state pilot requirements: it follows that state regulation in this area is expressly contemplated, rather than preempted, by the federal Act. Insofar as Chapter 125's pilotage requirement extends to American flag vessels engaged in the coasting trade, however, we agree with the district court's conclusion that it is preempted, wholly apart from the PWSA, by 46 U.S.C. 215 and 364.[10] Appellants so concede (Br. 10 n. 9).

Section 3(2) of Chapter 125 requires that all tankers between 40,000 and 125,000 DWT satisfy certain design and construction standards or, failing that, take on a tug escort when navigating Puget

[10] These statutes authorize the Coast Guard to regulate pilotage on enrolled vessels and prohibit the states from doing so. See p. 16, *infra*.

Sound. In our view the PWSA would preempt any state effort to exclude altogether the entry of tankers that did not comply with the state's design and construction standards. The PWSA gives the Secretary of Transportation virtually plenary authority to establish such standards for all oil tankers traversing American waters, and to be effective the Secretary's regulations must command uniform adherence. A spate of inconsistent state standards would have the practical effect of nullifying the Secretary's regulations and would impair the effective exercise of his responsibility under 46 U.S.C. (Supp. V) 391a(7) to attempt to coordinate his standards with those recognized by the international maritime community. In addition, state regulation of tanker design would jeopardize the success of the construction-differential subsidy program of the Merchant Marine Act of 1936 by interfering with the access to major ports of tankers built with the aid of public funds under that program.

On the other hand, an across-the-board tug escort requirement would not be preempted. In contrast to design and construction standards, tug escort requirements can be satisfied with relatively little inconvenience and expense and are similar to pilotage requirements, which have long been acknowledged as an appropriate subject matter for state and local regulation. See *Cooley* v. *Board of Wardens,* 12 How. 298. Neither the legislative history nor the text of the PWSA reveals a "clear and manifest purpose" (*Rice* v. *Santa Fe Elevator Corp., supra,* 331 U.S. at 230)

to override such regulatory efforts on the part of the states, and, in the absence of superseding federal regulations on the subject, across-the-board state tug escort requirements would not interfere with the administration or objectives either of the PWSA or of the Merchant Marine Act.

Section 3(2) imposes neither a complete ban on tankers between 40,000 and 125,000 DWT that do not conform to its design and construction standards, nor an across-the-board tug escort requirement. Rather, it imposes the tug requirement in effect as a penalty for noncompliance with the State's design standards. No vessel in existence can satisfy those standards, however, and the cost of taking on a tug escort is so small in comparison to the cost of complying with the design standards that, as a practical matter, it can be anticipated that ship builders and operators will simply ignore those standards. In these circumstances, we believe that Section 3(2) does not so encourage disregard for federal design and construction standards in favor of state standards as to be preempted by the PWSA or the Merchant Marine Act.[11]

Chapter 125's ban on tankers of 125,000 DWT or more is preempted with regard to federally licensed vessels by the Enrollment and Licensing Act. See *Douglas* v. *Seacoast Products, Inc., supra; Florida Lime & Avocado Growers, Inc.* v. *Paul,* 373 U.S. 132;

[11] In the district court the United States argued, as *amicus curiae*, that Chapter 125 was invalid in all respects, but further study has persuaded us that the tug escort provision of Chapter 125 is not preempted.

Gibbons v. *Ogden,* 9 Wheat 1. It is also preempted, with regard to both enrolled and registered vessels, by both Titles I and II of the PWSA. Title I empowers the Secretary to control vessel traffic in hazardous areas or conditions by establishing vessel size limitations (33 U.S.C. (Supp. V) 1221 (3)(iii)), and Title II empowers him to "deny entry into the navigable waters of the United States to any vessel not in compliance with" federal design and construction standards (46 U.S.C. (Supp. V) 391a(13)). The tanker ban interferes with the full exercise of these powers, and thereby undermines the Secretary's ability under the PWSA effectively to establish the physical standards for vessels navigating American waters. Moreover, the ban on tankers in excess of 125,000 DWT imperils the success of the construction-differential subsidy program of the Merchant Marine Act, under which approximately $500 million in public funds has been paid or is slated for payment for the construction of tankers of that size.

ARGUMENT

I

CHAPTER 125'S PILOTAGE REQUIREMENT IS PREEMPTED BY FEDERAL LAW WITH RESPECT TO ENROLLED VESSELS BUT NOT WITH RESPECT TO REGISTERED VESSELS

Section 2 of Chapter 125 states that "any oil tanker, whether enrolled or registered, of fifty thousand deadweight tons or greater, shall be required to take

a Washington State licensed pilot while navigating Puget Sound * * *" (A. 98). The district court correctly held (J.S. App. C, p. 9a) that insofar as this requirement extends to enrolled vessels[12] it conflicts with 46 U.S.C. 215 and 364 and therefore is invalid. The Coast Guard has authority under 46 U.S.C. 364 to license and regulate pilots on enrolled vessels,[13] and 46 U.S.C. 215 expressly prohibits the states from imposing additional licensing requirements with respect to the pilots of such vessels.[14] These federal statutes preempt any effort by the states to impose pilotage requirements on enrolled vessels. *Anderson* v. *Pacific Coast S.S. Co.*, 225 U.S. 187, 200–201; *Spraigue* v. *Thompson*, 118 U.S. 90, 95–96. Appellants therefore

[12] Enrolled vessels are those federally licensed to engage in the coastwise trade. Registered vessels are those engaged in the foreign trade. "The purpose of a register is to declare the nationality of a vessel engaged in trade with foreign nations, and to enable her to assert that nationality wherever found. The purpose of an enrolment is to evidence the national character of a vessel engaged in the coasting trade or home traffic, and to enable such vessel to procure a coasting license. The distinction between these two classes of vessels is kept up throughout the legislation of Congress on the subject, and the word register is invariably used in reference to the one class, and enrolment, in reference to the other." *The Mohawk*, 3 Wall. 566, 571. See *Anderson* v. *Pacific Coast S.S. Co.*, 225 U.S. 187, 199. See also *Douglas* v. *Seacoast Products, Inc.*, No. 75–1255, decided May 23, 1977, slip op. 7–8.

[13] "[E]very coastwise seagoing steam vessel * * * not sailing under register, shall, when under way, except on the high seas, be under the control and direction of pilots licensed by the Coast Guard." 46 U.S.C. 364.

[14] "No State or municipal government shall impose upon pilots of steam vessels any obligation to procure a State or other license in addition to that issued by the United States * * *." 46 U.S.C. 215.

appropriately concede (Br. 10 n. 9) that Section 2 of Chapter 125 is invalid insofar as it attempts to reach enrolled vessels.

Section 2 is not preempted, however, insofar as it applies to registered vessels. Congress explicitly exempted vessels "sailing under register" from the requirement that they be "under the control and direction of pilots licensed by the Coast Guard." 46 U.S.C. 364.[15] See *Anderson* v. *Pacific Coast S.S. Co.*, *supra*, 225 U.S. at 200–201.

Nor is Section 2 preempted by the PWSA. On the contrary, Section 101(5) of that Act, 33 U.S.C. (Supp. V) 1221(5), authorizes the Secretary to "require pilots on self-propelled vessels engaged in the foreign trades in areas and under circumstances where a pilot is not otherwise required by State law to be on board until the State having jurisdiction of an area involved establishes a requirement for a pilot in that area or under the circumstances involved." This language evidences Congress' intent to leave undisturbed the states' long-standing authority to impose pilotage requirements in the absence of superseding or conflicting federal regulation. See *Cooley* v. *Board of Wardens*, 12 How. 298; *Anderson* v. *Pacific Coast S.S. Co.*, *supra*. It follows that the State of Washington may legitimately require registered oil tankers to take on state licensed pilots in Puget Sound and that Section 2 of Chapter 125 is enforceable in this respect.

[15] Appellees acknowledge that Section 2 is not preempted by 46 U.S.C. 215 and 364 (Complaint, ¶ 26, A. 27; Plaintiff's Trial Brief, p. 62).

II

CHAPTER 125'S TUG ESCORT REQUIREMENT IS NOT PREEMPTED BY FEDERAL LAW

Section 3(2) of Chapter 125 provides, in the first instance, that oil tankers of between 40,000 and 125,000 DWT may not enter Puget Sound unless they satisfy certain design and construction requirements.[16] A proviso to that section, however, excuses noncompliance for vessels that take on an "escort of a tug or tugs with an aggregate shaft horsepower equivalent to five percent of the [vessel's] deadweight tons." Taken as a whole, therefore, Section 3(2) requires oil tankers of between 40,000 and 125,000 DWT that do not satisfy state-imposed design and construction requirements to be accompanied by a tug escort when navigating Puget Sound. We believe that this requirement is not currently preempted by federal law.

As we show below (pp. 19–31, *infra*), a state may not bar entry of tankers that do not comply with its design and construction standards. On the other hand, until federal regulations are promulgated to the contrary, a state may impose reasonable tug escort requirements on all vessels entering its navigable waters (pp. 31–34, *infra*). In these circumstances, and especially because the cost of complying with Washington's tug escort requirement is small relative to that of satisfying its design and construction specifications,

[16] The vessels must be equipped with a prescribed shaft horsepower, twin screws, double bottoms, two radars, one of which must be collision avoidance radar, and "[s]uch other navigational position location systems as may be prescribed from time to time by the board of pilotage commissioners."

we conclude that for the present the State may impose that requirement in effect as a penalty for noncompliance with its design and construction standards (pp. 34–37, *infra*).

A. A STATE MAY NOT BAR ENTRY OF TANKERS THAT DO NOT COMPLY WITH ITS DESIGN AND CONSTRUCTION STANDARDS

Title II of the PWSA gives the Secretary comprehensive authority to establish the physical and operating standards that vessels navigating American waters must meet:[17]

> * * * the Secretary * * * shall establish * * * such additional rules and regulations as may be necessary with respect to the design and construction, alteration, repair, and maintenance of such vessels, including, but not limited to, the superstructures, hulls, places for stowing and carrying such cargo [oil], fittings,

[17] Arguably the Secretary would also have power under Title I to promulgate design and construction standards. See 33 U.S.C. (Supp. V) 1221(3)(iii) and (iv), authorizing the Secretary, in areas or under circumstances posing especially hazardous conditions, to establish "vessel size and speed limitations" and to restrict vessel operation "to vessels which have particular operating characteristics and capabilities." Title II, however, explicitly directs the Secretary to establish design and construction standards and does not limit his authority to act only in hazardous areas or circumstances. Its addition to Title I suggests that Congress doubted that the powers conferred by the latter were sufficiently broad to assure "the adequate protection of the marine environment" (46 U.S.C. (Supp. V) 391a(1)) through improvement of vessel design and construction. See S. Rep., *supra*, at p. 14 (the goals of Title II "could probably not be adequately approached through" Title I). In exercising his authority to establish design and construction standards, the Secretary has acted principally under Title II rather than Title I (see 40 Fed. Reg. 48280, 48283 (1975); 42 Fed. Reg. 24868, 24869 (1977)).

> equipment, appliances, propulsive machinery, auxiliary machinery, and boilers thereof; and with respect to all materials used in such construction, alteration, or repair; with respect to the handling and stowage of such cargo, the manner of such handling or stowage, and the machinery and appliances used in such handling and stowage; and with respect to equipment and appliances for life saving, fire protection, and the prevention and mitigation of damage to the marine environment; and with respect to the operation of such vessels * * *. [46 U.S.C. (Supp. V) 391a(3).] [18]

Neither Title II itself nor its legislative history contains an express declaration of preemption. "That, however, is not decisive." *City of Burbank* v. *Lockheed Air Terminal, Inc., supra,* 411 U.S. at 633. In our view, the breadth of the responsibilities conferred upon the Secretary, the assignment to him of the duty to balance the need for design and construction standards, and the very nature of the subject matter to be regulated, all lead to the conclusion that state statutes that would ban vessels for noncompliance with state-imposed design and construction standards are preempted.

[18] "To the extent possible" the standards promulgated under the foregoing authority are to "include, but not be limited to standards to improve vessel maneuvering and stopping ability and otherwise reduce the possibility of collision, grounding, or other accident, to reduce cargo loss following collision, grounding, or other accident, and to reduce damage to the marine environment by normal vessel operations such as ballasting and deballasting, cargo handling, and other activities." 46 U.S.C. (Supp. V) 391a(7).

1. Tanker design and construction standards must be uniform

To be effective, the Secretary's regulations under Title II must command uniform adherence throughout the country.[19] If each coastal state, acting on the basis of local interests, were permitted to impose its own design and construction standards, the conflicting obligations faced by shipbuilders and operators would be intolerable.[20] Moreover, the Secretary's regulations in practical effect would be nullified in any state where more stringent requirements were enacted.[21] In short, state imposition of mandatory design and construction standards would frustrate Congress' purpose "to establish comprehensive regulations for the design, construction, maintenance, and operation of [oil tankers]." S. Rep., *supra,* at p. 7; see also *id.* at 9–10.

[19] The inquiry into the need for uniformity typically characterizes cases decided under the Interstate Commerce Clause. *E.g., Kelly* v. *Washington, supra,* 302 U.S. at 14–15; *Cooley* v. *Board of Wardens, supra,* 12 How. at 317–320. But it is no less appropriate in preemption cases, such as this one, where the federal statute requires a unitary regulatory scheme lest Congress' will be frustrated. See, *e.g., City of Burbank* v. *Lockheed Air Terminal, Inc., supra,* 411 U.S. at 638–639.

[20] The promulgation by the coastal states of different design and construction standards is more than just a possibility. The State of Alaska has recently enacted legislation requiring payment of a "risk charge" by vessels that do not conform to design requirements that are materially different from Chapter 125's (Alaska Statutes § 30.20.010 (Cum. Supp. 1976) (see A. 95–96)), and the State of California is considering the adoption of similar legislation (Br. for the State of California, *et al.,* p. 3 n. 2).

[21] Chapter 125's design and construction standards are considerably more stringent than those that the Secretary, through a

The objective of the original Tank Vessel Act, to which Title II is an amendment, was the establishment of "a reasonable and *uniform* set of rules and

delegation of his authority under Title II to the Coast Guard (49 C.F.R. 1.46(n)(4)), has promulgated. See 33 C.F.R. Part 157 (Rules and Regulations for Protection of the Marine Environment Relating to Tank Vessels Carrying Oil in Domestic Trade). Effective October 14, 1975, new tankers of 70,000 DWT or more that engage in the domestic trade were required to have segregated ballast tanks and to conform to tank arrangement and size requirements and structural and stability requirements; existing vessels in the domestic trade were required to be upgraded by the use of slop tanks, separators, oil discharge and monitoring systems, and the alteration of piping systems. Those regulations were designed to conform to the standards specified in the International Convention for the Prevention of Pollution from Ships, 1973. See 40 Fed. Reg. 48280 (1975). The Convention did not adopt the requirements imposed by Chapter 125, and the Secretary's regulations do not include such requirements. See *ibid.;* see also the Coast Guard Final Environmental Statement accompanying that rulemaking (A. 207, 209, 305, 310).

Effective January 8, 1976, additional requirements for the distribution of segregated ballast were imposed upon the new vessels subject to the foregoing regulations. 41 Fed. Reg. 1479 (1976). These requirements go beyond those imposed by the 1973 Convention. See 41 Fed. Reg. 54177 (1976). On December 13, 1976, the regulations were extended to cover foreign-flag as well as United States-flag vessels. *Ibid.* The Coast Guard on May 16, 1977, announced a proposed rulemaking (42 Fed. Reg. 24868) that, in accordance with the President's Message to Congress of March 17, 1977, would substantially revise Part 157 by imposing more stringent design and construction requirements than those now in effect. See note 27, *infra.*

Acting under Title I, the Coast Guard has promulgated Navigation Safety Rules, 33 C.F.R. Part 164 (adopted at 42 Fed. Reg. 5956 (1977)), which require, *inter alia*, that vessels over 1600 DWT carry certain safety equipment (*e.g.*, a radar systems and an echo depth sounding device). Those rules are also subject to a proposed amendatory rulemaking. 42 Fed. Reg. 24871 (1977).

regulations concerning ship construction ***." H.R. Rep. No. 2962, 74th Cong., 2d Sess. 2 (1936) (emphasis added). Congress' direction to the Secretary in Title II to establish "minimum standards" of design and construction (46 U.S.C. (Supp. V) 391a(7)) does not evidence an intention to alter the design of the original Act by allowing the states to impose more demanding standards. Rather, the phrase "minimum standards" implies only that the Secretary may not bar shipbuilders and operators from voluntarily adopting higher standards on their own.[22]

Congress directed the Secretary, in setting uniform minimum design and construction standards, to weigh "the extent to which such [standards] will contribute

[22] In *Florida Lime & Avocado Growers, Inc.* v. *Paul, supra*, the Court held that the Agricultural Adjustment Act, 48 Stat. 31, 7 U.S.C. 601 *et seq.*, which authorizes the Secretary of Agriculture to establish "minimum standards of quality and maturity" for agricultural commodities (7 U.S.C. 602(3)), did not preempt the State of California's regulations regarding the maturity of avocados reaching its retail markets even though those regulations set forth a different test for maturity than a federal marketing order promulgated under the Act. The Court said (373 U.S. at 148), "[b]y its very terms, in fact, the [federal] statute purports only to establish *minimum* standards" (emphasis in original). The Court did not, however, rest its decisions solely on Congress' use of the term "minimum standards." On the contrary, it ruled (*ibid.*) that the "[o]ther provisions of the Act, and their history, militate even more strongly against federal displacement of these state regulations." See *id.* at 148–150. The decision therefore does not stand for the proposition that whenever Congress provides for "minimum standards" in a federal regime state regulation in the same field is necessarily permissible. Each preemption case "turns on the peculiarities and special features of the federal regulatory scheme in question." *City of Burbank* v. *Lockheed Air Terminal, Inc., supra*, 411 U.S. at 638.

to safety or protection of the marine environment" against "the practicability of compliance therewith, including cost and technical feasibility." 46 U.S.C. (Supp. V) 391a(4).[23] That responsibility cannot reasonably be shared with the states. The establishment of design and construction standards "requires a delicate balance between safety and efficiency," and "[t]he interdependence of these factors requires a uniform and exclusive system of federal regulation if the congressional objectives underlying the [PWSA] are to be fulfilled." *City of Burbank* v. *Lockheed Air Terminal, Inc., supra,* 411 U.S. at 638–639.

Although Title II, which is the principal source of the Secretary's power to impose tanker design and construction standards, contains no express statement of preemption, Section 102(b) of Title I provides that the states may prescribe safety equipment standards "for structures only." 33 U.S.C. (Supp. V) 1222(b). That provision preempts state efforts to regulate vessel equipment (see pp. 33–34, *infra*), and it supports the conclusion that the more expansive power to regulate vessel design and construction also was meant to be exercised by the Secretary alone.

2. The power to impose design standards on foreign vessels rests solely with the Secretary under the PWSA

Congress considered the possibility of restricting Title II to American vessels alone. S. Rep., *supra,* at

[23] Furthermore, "the Secretary is free to exercise his discretion in determining in each instance whether a particular requirement should apply only to new construction, to existing vessels, to vessels in the process of being constructed, and so forth." S. Rep., *supra,* at p. 27.

p. 22. Ultimately it determined to extend Title II to foreign vessels as well,[24] but in so doing it acknowledged that there were "justifiable concerns * * * about the unilateral application by the United States of standards on vessels of foreign registry," for "this has traditionally been an area for international rather than national action." *Id.* at 22–23. Congress was aware of the existence of multinational organizations dedicated to improving vessel standards and recognized that "since the problem of marine pollution is world-wide," multilateral action "would be far preferable to unilateral imposition of standards." *Id.* at 23.

Congress' decision to extend Title II to foreign as well as American vessels rested in large part on its conclusion that the need for vessel design standards to protect the environment was too pressing to await

[24] "[C]omprehensive new standards applicable only to United States-flag vessels would be ineffective and possibly self-defeating. Representatives of the Department of Transportation and the Department of Commerce indicated that approximately 85 percent of the tankers operating in our navigable waters are of foreign registry. Clearly, legislation which did not apply to the overwhelming majority of the vessels in our waters would have little beneficial impact on the environment. In addition, the imposition of standards involving some cost on American vessels without corresponding imposition of the same standards on foreign vessels, would put American vessels at a competitive disadvantage and perhaps ultimately result in U.S. flag vessels representing an even smaller part of the total number of tankers in our waters. Therefore, new standards must apply equally to both U.S. and foreign vessels if the environment is to be protected and if the American merchant marine is not to be competively disadvantaged." S. Rep., *supra,* at p. 22.

the uncertain outcome of international negotiation."[25] But its determination to proceed unilaterally was not made without regard to the possibility that effective multinational standards might soon be forthcoming. See S. Rep., *supra,* at p. 28. "[I]n light of the preference for multilateral action * * * the use of a deferral procedure" (*id.* at 23–24, 27) was adopted. With respect solely to standards relating to design, construction, alteration, and repair,[26] the Secretary is required to transmit his proposed regulations "to appropriate international forums for consideration as international standards." 46 U.S.C. (Supp. V) 391a(7)(B). The Secretary was forbidden to take final, unilateral action before January 1, 1974. 46 U.S.C. (Supp. V) 391a(7)(C). "The purpose of this deferral of the effective date [was] to apprise other nations of the intent of the United States to impose standards on vessels in its navigable waters and to permit a reasonable period for international action." S. Rep., *supra,* at p. 28. Congress further expressed its view that, if an international "marine environmental safety convention is concluded, and rules and regulations are

[25] "As a practical matter, the IMCO [Intergovernmental Maritime Consultative Organization] record has been rather dismal to date in the area of design and construction standards for protection of the marine environment. * * * While the committee remains committed to the proposition that multilateral action in this area is preferable, it is not willing to sacrifice the objective of protection of the marine environment on the altar of that principle. Much more rapid and comprehensive action will be required if the United States is to continue to rely on multilateral forums." S. Rep., *supra*, at p. 23.

[26] "Other areas for regulation (for example, loading and unloading procedures, equipment, and so forth) are not affected * * *." S. Rep., *supra*, at p. 28.

adopted pursuant to such convention which generally address the regulation of similar topics as those published by the Secretary * * * there will be no need for unilateral imposition of standards by the United States." *Ibid.*[27]

Approximately eighty-five percent of the tankers operating in our navigable waters are of foreign registry (S. Rep., *supra,* at p. 22), and ninety-four percent of the oil imported by the United States is

[27] The January 1, 1974, date was chosen by Congress in consideration of the then-impending 1973 International Conference on Marine Pollution. S. Rep., *supra*, at p. 28. That Conference resulted in the International Convention for the Prevention of Pollution from Ships, 1973, and the Secretary's first regulations under Title II conformed to the standards specified in that Convention. See note 21, *supra.*

On March 17, 1977, the President transmitted a message to Congress in which he announced a series of initiatives designed to cope with the problem of pollution from oil tankers. See 13 Weekly Comp. of Pres. Doc. 408 (March 21, 1977). He stated that "[p]ollution of the oceans by oil is a global problem requiring global solutions" and announced his intention "to communicate directly with the leaders of a number of major maritime nations to solicit their support for international action." He asked the Senate to ratify the International Convention for the Prevention of Pollution from Ships, and he instructed the Secretary of Transportation to establish new design and equipment standards for all oil tankers over 20,000 DWT calling at American ports. Those standards, to be effective within five years, include requirements for double bottom hulls on all new tankers and inert gas and backup radar systems on all tankers. The President also instructed the Department of State and the Coast Guard "to begin diplomatic efforts to improve the present international system of inspection and certification" of vessels, and recommended "the immediate scheduling of a special international conference for late 1977 to consider these construction and inspection measures."

The Secretary has noticed a proposed rulemaking to amend Part 157 to implement the standards called for by the President (42 Fed. Reg. 24868 (1977)), and those standards have been

carried in foreign-flag ships (A. 58). Given Congress' recognition that, in extending Title II to foreign vessels, it was entering into "a delicate area of international relationships" (S. Rep., *supra,* at p. 24), its "strong intention that standards for the protection of the marine environment be adopted, multilaterally if possible" (*id.* at 28), and its expression of that intent in the statute, it is most unlikely that Congress also could have contemplated that each of the coastal states would remain free, after passage of the PWSA, to impose upon foreign vessels design and construction standards different from each other's and from the Secretary's. Congress was concerned about the international consequences of even a single standard imposed unilaterally by the United States; it cannot be understood to have countenanced the promulgation of a patchwork of conflicting standards that would be the likely result of independent action by the several coastal states.[28]

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transmitted to IMCO for its consideration. The Secretary advises us that those standards are expected to be voted on by IMCO at a meeting scheduled for February 1978.

[28] We disagree with appellants' contention that consideration of other federal statutes relating to conservation of the marine environment and the waters of the United States leads to the conclusion that the PWSA is not preemptive. The four statutes cited by appellants—the Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 816, 33 U.S.C. (Supp. V) 1251 *et seq.*; the Coastal Zone Management Act of 1972, 86 Stat. 1280, 16 U.S.C. (Supp. V) 1451 *et seq.*; the Estuarine Areas Act of 1968, 82 Stat. 625, 16 U.S.C. 1221 *et seq.*; and the Deepwater Port Act of 1974, 88 Stat. 2126, 33 U.S.C. (Supp. V) 1501 *et seq.*—do indeed elicit and rely upon cooperation from the states. See, respectively, 33 U.S.C. (Supp. V) 1251(b); 16 U.S.C. (Supp. V) 1451 and 1452; 16 U.S.C. 1221; 33 U.S.C. (Supp. V) 1501. The district court correctly observed (J.S. App. C, pp. 9a–10a), however, that in each of the foregoing statutes "Congress explicitly invited state participation in various phases of the formation of the regulatory scheme," whereas in the PWSA it did not. Moreover, none of the Acts relied on by appellants—in contrast to the PWSA—requires uniformity of regulation for both domestic and foreign policy reasons. In short, Congress' creation of cooperative federal-state programs to deal with some aspects of marine conservation does not indicate that it intended that the Secretary's power to regulate tanker design standards under the PWSA in effect would be subject to veto by the states.

3. The Merchant Marine Act of 1936 further evidences a federal intent to preempt the field of tanker design

The Merchant Marine Act of 1936, 49 Stat. 1985, as amended, 46 U.S.C. 1101 *et seq.*, was enacted to foster and develop a merchant marine that is "owned and operated under the United States flag by citizens of the United States" and that is "composed of the best-equipped, safest, and most suitable types of vessels, constructed in the United States * * *." 46 U.S.C. 1101.

Subchapter V of the Act, 46 U.S.C. 1151–1161, establishes the Construction-Differential Subsidy ("CDS") program, pursuant to which the Maritime Administration in the Department of Commerce, in order to promote shipbuilding in American shipyards, is authorized to subsidize the amount charged a ship purchaser by an American shipbuilder "over the

fair and reasonable estimate of cost * * * of the construction of [the vessel] * * * under similar plans and specifications * * * in a [representative] foreign shipbuilding center * * *." 46 U.S.C. 1152(b). The program applies, with minor exceptions not relevant here, only to vessels "to be used in the foreign commerce of the United States." 46 U.S.C. 1151.

During the period June 30, 1975, to September 30, 1976, ten new tankers built with the aid of approximately $162.4 million in public funds under the program were delivered from United States shipyards.[29] As of September 30, 1976, there were outstanding contracts for the construction of 16 additional tankers, to be financed by an estimated $385.2 million in CDS funds.[30] None of the ships that have been or are to be constructed under the program—representing a recent public investment of over $547.6 million [31]—will comply with all of the design and construction standards of Section 3(2).

Before a subsidy application may be approved, the Secretary of Commerce must determine, *inter alia,* that "the plans and specifications call for a new vessel which will meet the requirements of the foreign commerce of the United States, will aid in the promotion

[29] Annual Report of the Maritime Administration for Fiscal Year 1976 and the Transition Quarter Ending September 30, 1976, Table 2, p. 74 (hereinafter "MarAd Annual Report"). The figure 162.4 million, which does not appear in Table II, has been supplied to us by the Maritime Administration.

[30] MarAd Annual Report, Appendix I, p. 80.

[31] Since the 1936 Act was passed, $2,497,418,461 has been expended for new construction or reconstruction of all types of vessels. MarAd Annual Report, Appendix II, p. 82. Of that amount, the Maritime Administration advises us that $422.6 million has been expended on tankers alone.

and development of such commerce, and be suitable for use by the United States for national defense or military purposes in time of war or national emergency." 46 U.S.C. 1151(a).[32] The use of public funds in furtherance of the policies of the Merchant Marine Act could be largely defeated if the states were free to deny access of CDS vessels to major ports by enacting design requirements beyond those deemed necessary by the Secretary of Commerce.

B. UNTIL FEDERAL REGULATIONS ARE PROMULGATED TO THE CONTRARY, A STATE MAY IMPOSE REASONABLE TUG ESCORT REQUIREMENTS ON ALL VESSELS ENTERING ITS NAVIGABLE WATERS

In our view, the states at present have authority to impose reasonable tug escort requirements on all vessels entering their navigable waters. Acting under both Titles I and II of the PWSA,[33] the Secretary of

[32] The Maritime Administration advises us that subsidy will not be awarded for the construction of any tank vessel that could not meet the requirements for certification by the Coast Guard under 46 U.S.C., ch. 14, which includes the Tank Vessel Act as amended by Title II of the PWSA. In turn, the Secretary of Transportation under Title II of the PWSA is expressly directed, in formulating tanker design and construction standards, to "consult with other appropriate Federal departments and agencies, and particularly with * * * the Secretary of Commerce." 46 U.S.C. (Supp. V) 391a(4). That provision was included in order to insure that the Maritime Administration "will be consulted and given an opportunity for input" into the rulemaking process. S. Rep., *supra,* at p. 26.

[33] Section 101(3)(iii) (in Title I) empowers the Secretary to control vessel traffic in hazardous areas or circumstances by establishing vessel operating conditions, and Section 201(3) (in Title II) directs him to establish such regulations as may be necessary with respect, *inter alia,* to the operation of oil tankers. Both of these grants of authority include the power to prescribe tug escort regulations.

Transportation has issued an advance notice of proposed rulemaking to amend 33 C.F.R. Part 164 to require tug escorts of vessels operating in confined waters. 41 Fed. Reg. 18770 (1976). The proposed federal rules "are intended to provide uniform guidance for the maritime industry and Captains of the Port[s]." *Id.* at 18771. When those rules become effective, they will supersede any inconsistent state regulations on the same subject. Pending their issuance in final form, however, we believe that reasonable, nondiscriminatory, state tug escort requirements are not preempted.[34]

The power to prescribe tug escort requirements is one traditionally within the competence of the states. Cf. *Askew* v. *American Waterways Operators, Inc.*, 411 U.S. 325, 343; *Huron Cement Co.* v. *Detroit*, 362 U.S. 440, 442. In the absence of any federal regulations on the subject, state action in this field is not prohibited, expressly or impliedly, by the PWSA, nor does it conflict with that Act in any respect. In contrast to design and construction standards, tug escort requirements entail relatively minor expense and do not significantly impede tanker traffic between the

[34] The Secretary has proposed tug escort regulations in connection with the vessel traffic system established under Title I with respect to the Prince William Sound, which includes the port of Valdez, Alaska. See 42 Fed. Reg. 7164 (1977), amending 33 C.F.R. Part 161. Those regulations, which, when final, will preempt any conflicting requirements the State of Alaska might impose, provide that "[t]he master of a tank vessel of 35,000 or more gross tons operating in the VTS [Vessel Traffic System] area shall ensure that tug assistance is used when docking and undocking and, if directed by the VTC [Vessel Traffic Center], when in Valdez Narrows." 33 C.F.R. 161.376(b).

various coastal states. Foreign-flag vessels are accustomed to complying with local pilot rules, and the imposition of nondiscriminatory tug escort requirements as well is not likely to be a matter of international concern. In addition, such requirements have no adverse impact on the construction subsidy program under the Merchant Marine Act.

The prohibition in Section 102(b) of the PWSA, 33 U.S.C. (Supp. V) 1222(b), against state efforts to prescribe "higher safety equipment requirements or safety standards" for vessels than those promulgated by the Secretary does not, in our view, reach state tug escort requirements. As the legislative history of that provision demonstrates, it was meant to preempt state regulation of vessel equipment [35] and does

[35] The preemptive language of Section 102(b) did not appear in the initial version of the bill (H.R. 8140) that became the PWSA. It was added by the House Committee on Merchant Marine and Fisheries (H.R. Rep. No. 92-563, 92d Cong., 1st Sess. 15 (1971)):

"• • • [I]t was felt that H.R. 8140 does not make it absolutely clear that the Coast Guard regulation of vessels preempts state action in this field. The inserted language is a positive statement retaining State jurisdiction over structures and making clear that State regulation of vessels is not contemplated.

"Last year in the hearings on H.R. 17830 [a predecessor bill], Subcommittee Counsel asked the Coast Guard General Counsel whether it was the intention of the Coast Guard that States should prescribe safety equipment standards for vessels. The Coast Guard witness said that it was their intention that higher vessel equipment regulations and standards by States should apply to structures only and not to vessels. He agreed that the language of H.R. 17830 was not clear in this regard and that we should put some clarifying language in the section.

"Your Committee adopted the suggested language since it will make clear the intent mentioned above."

not reveal a "clear and manifest purpose" to supersede "the historic police powers of the State[]" (*Rice* v. *Santa Fe Elevator Corp., supra,* 331 U.S. at 230) when the exercise of those powers does not interfere with the administration or objectives of the federal Act.

C. FOR THE PRESENT, A STATE MAY BURDEN NONCOMPLIANCE WITH ITS DESIGN AND CONSTRUCTION STANDARDS BY IMPOSING A SELECTIVE TUG ESCORT REQUIREMENT

In the preceding sections we have shown, as limiting propositions, that a state may not impose mandatory design and construction standards on vessels entering its waters but may impose an across-the-board tug escort requirement on all vessels or, by inference, on all vessels of a certain size. Washington's Chapter 125 does neither of these things, however. Instead, the State has imposed a selective tug escort requirement that applies only to those vessels that do not comply with State design and construction standards.[36]

Section 3(2) of Chapter 125 in effect penalizes the

[36] No tanker in existence satisfies the design standards of the Washington statute (A. 66). Thus the statute in fact currently operates as an across-the-board tug escort requirement for all oil tankers between 40,000 and 125,000 DWT. We believe, however, that the statute must be analyzed on its own terms, as a burden on noncompliance with state design and construction standards, and not as a *de facto* tug escort requirement of general applicability. There are two reasons for this, one legal and one practical: first, insofar as the statute is intended to induce or coerce compliance with the State's standards, the question whether such efforts to affect future behavior are preempted cannot be answered simply by stating that no vessels now comply with those standards;

operators of vessels that do not comply with design and construction standards different from those established by the federal government. There can be no doubt that, in so doing, Section 3(2) works somewhat at cross-purposes with the PWSA, which evinces a congressional intent to establish comprehensive and uniform regulations governing the design, construction, maintenance, and operation of oil tankers (see pp. 19–31, *supra*). We conclude, however, that Section 3(2) does not "'stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress'". *Jones* v. *Rath Packing Co., supra,* slip op. 5, quoting from *Hines* v. *Davidowitz, supra,* 312 U.S. at 67.

As we have explained above (pp. 31–32, *supra*), state rules requiring tug escorts of vessels in their waters are subject to preemption by regulations that may be promulgated in the future by the Secretary of Transportation pursuant to Titles I and II of the PSWA. Final, comprehensive, federal regulations prescribing the circumstances or locales in which vessels must be accompanied by tug escorts, and those in which they need not be so accompanied, will supersede any state regulation of that subject, including the requirement imposed by Section 3(2). In these circumstances, a finding of current preemption would appear to be justified only if the state statute works a sub-

second, to sustain the state statute for the present as an across-the-board tug escort requirement would merely defer final determination of the validity of the statute until the moment some vessel appears that complies with the state design and construction standards.

stantial and immediate interference with the federal scheme.

It cannot be said that Section 3(2) substantially interferes with the federal scheme. The cost of complying with Section 3(2)'s tug escort requirement is small relative to that of satisfying its alternative design and construction standards. No tanker now afloat has all of the design features prescribed by Section 3(2) (A. 66), and "retrofitting" existing tanker fleets to incorporate those features "is not economically feasible under current and anticipated market conditions" (A. 67). Thus it can be anticipated that, for the present, tanker operators plying Puget Sound will simply take on the required tug escort without making any effort at compliance with the State's design specifications.

The economic considerations are similar with respect to new construction. Just to equip a new tanker with double bottom and twin screws, not to mention the other equipment specified by Section 3(2) (see note 16, *supra*), increases its cost by approximately eleven percent (A. 62), or on the average by about $10 million (see A. 54, 55). The burden of complying with the alternative tug escort requirement by comparison is insubstantial.[37]

[37] ARCO estimates that, even operating several tankers, it will incur approximately $277,500 in tug fees per year (A. 68). The discounted cost of making annual payments in that amount for fifty years, at an 8 percent discount rate, would be approximately $3.4 million, or roughly one-third the cost of incorporating the design specifications of Section 3(2) into only a single new tanker. See, *e.g.*, Bierman & Smidt, *The Capital Budgeting Decision* 396 (2d ed., 1966).

In short, Section 3(2) offers insufficient inducement, or applies inadequate coercion, to cause either shipbuilders or tanker operators to deviate from federal design and construction standards. This apparently would be true even if the alternative tug escort requirement were perceived to be permanent (see note 37, *supra*). But that requirement is not permanent; it is subject to imminent preemption by federal regulation. It seems plain that no builder, owner, or operator will undertake the major expense of complying with the State's design specifications merely in order to avoid what can be expected to be a temporary tug escort requirement. Accordingly, Section 3(2) does not so encourage disregard for federal design and construction standards in favor of state standards as to be preempted by the PWSA or the Merchant Marine Act.

III

CHAPTER 125'S EXCLUSION OF TANKERS IN EXCESS OF 125,000 DWT IS PREEMPTED BY FEDERAL LAW

Section 3(1) of Chapter 125 provides that "[a]ny oil tanker, whether enrolled or registered, of greater than one hundred and twenty-five thousand deadweight tons shall be prohibited from" entering Puget Sound. That provision is preempted, with respect to enrolled and licensed vessels, by the Enrollment and Licensing Act of February 18, 1793, 1 Stat. 305, 46 U.S.C. 251 *et seq.*, and, with respect to both enrolled and registered vessels, by the PWSA and the Merchant Marine Act of 1936.

A. THE ENROLLMENT AND LICENSING ACT BARS THE STATES FROM UNREASONABLY BANNING LICENSED VESSELS FROM THEIR WATERS

This Court determined in *Gibbons* v. *Ogden*, 9 Wheat. 1, 213, that the federal license granted pursuant to the Enrollment and Licensing Act conveys an unequivocal authority to carry on the trade for which it was issued: "[t]he grant of the privilege * * * convey[s] the right [to carry on the licensed activity] to which the privilege is attached." The Court concluded that the Commerce Clause of the Constitution empowers Congress to grant such authority and that the authority so granted therefore was not subject to unreasonable interference by the states. Accordingly, the Court struck down a New York statute that, by conferring a steamship monopoly in state waters, excluded other federally licensed vessels from the coasting trade. Subsequent decisions have confirmed "[t]hat no State may completely exclude federally licensed commerce." *Florida Lime & Avocado Growers, Inc.* v. *Paul, supra,* 373 U.S. at 142. Washington's ban on tankers in excess of 125,000 DWT violates that principle, for it completely excludes from Puget Sound an entire class of federally licensed and enrolled vessels.[38]

Moreover, Section 3(1) cannot be sustained as merely "impos[ing] upon federal licensees reasonable, nondiscriminatory conservation and environmental protection measures otherwise within [the State's] police power." *Douglas* v. *Seacoast Products, Inc.,* No. 75–1255, decided May 23, 1977, slip op. 11. The tanker ban has not been shown to be reasonably related to the State's avowed purpose of protecting Pudget Sound from oil spills. There is no indication how the figure 125,000 DWT was arrived at (many tankers in excess of that weight have called at ARCO's Cherry Point without incident (p. 3, *supra*)), and the State has stipulated (A. 84):

> Experts differ and there is good faith dispute as to whether the movement of oil by a smaller number of tankers in excess of 125,000 DWT in Puget Sound poses an increased risk of oil spillage compared to the risk from the movement of a similar amount of oil by a larger number of smaller tankers in Puget Sound.

In short, given that Section 3(1) imposes "an absolute ban" (*Douglas* v. *Seacoast Products, Inc., supra,* slip op. 11) on federally licensed vessels over 125,000 DWT, and is as likely to defeat as to serve its purpose of protecting the marine environment from oil pollution, it does not fall among those "reasonable * * * measures" that the states may impose upon vessels authorized by the Enrollment and Licensing Act to engage in the coastwise trade.[39]

[38] Most of ARCO's vessels were expected to be licensed by the time the Trans-Alaska Pipeline System began operation (A. 56).

[39] Cf. *Kelly* v. *Washington*, *supra*, 302 U.S. at 15 (suggesting that under the Commerce Clause the states retain power to impose such regulations only if they are "plainly essential to safety and seaworthiness").

B. THE PWSA AND THE MERCHANT MARINE ACT OF 1936 PRECLUDE THE STATE FROM EXCLUDING VESSELS ON THE BASIS OF DEADWEIGHT TONNAGE

Both Titles I and II of the PWSA preempt Chapter 125's ban on tankers of over 125,000 DWT. Section 101(3)(iii) of Title I authorizes the Secretary to control vessel traffic in hazardous areas or conditions by "establishing vessel size and speed limitations," and the legislative history of that Title indicates that Congress intended to vest that power in the Secretary to the exclusion of the states.[40] That power has been exercised by the Secretary's delegate in a manner that permits entrance into Puget Sound of vessels over 125,000 DWT.[41] By necessary inference, the State is without power to impose such a ban.

Moreover, Chapter 125's tanker ban can be likened in practical effect both to a mandatory safety equip-

[40] See, *e.g.*, the remarks of Congressman Keith that state laws "banning giant tankers" should not be permitted and that "[w]e do not want the States to resort to individual actions that adversely affect our national interest." Hearings on H.R. 867, H.R. 3635, H.R. 8140 (Ships and Vessels: Port and Harbor Safety) before the Subcommittee on Coast Guard, Coast and Geodetic Survey, and Navigation of the House Committee on Merchant Marine and Fisheries, 92d Cong., 1st Sess. 30 (1971). See also *id.* at 32 (Congressman Tiernan stating that a state ban of large tankers would require "more vessels in carrying the fuels that we need for our demands in keeping the economy going").

[41] The Coast Guard Commander of the Vessel Traffic Center overseeing the Vessel Traffic System for Puget Sound (see note 9, *supra*) has determined that, in the Rosario Strait, no vessel of 70,000 DWT may pass another vessel of that size in either direction (A. 65). In adverse weather the limitation is reduced to 40,000 DWT (*ibid.*). No other size limitation is imposed.

ment requirement, which Section 102(b) of the PWSA, 33 U.S.C. (Supp. V) 1222(b), prohibits the states from imposing on vessels, and to a design and construction requirement, which, as we have shown (pp. 19–31, *supra*), is preempted by Title II of the PWSA. Neither the Secretary's currently effective regulations under Title II, nor those that he had proposed in response to the President's directive (see note 27, *supra*), includes a general ban on tankers over a certain size. Section 3(1) of Chapter 125 thus excludes vessels that the Secretary has determined may enter United States ports and frustrates Congress' objective of federal regulation of tanker design and construction standards.

Appellants suggest (Br. 52) that the depth of Puget Sound rather than Section 3(1) controls access of large tankers. But not all tankers in excess of 125,000 DWT have a draft beyond the Sound's ability to accommodate, as is evidenced by the number of such tankers that called at ARCO's Cherry Point refinery before Section 3(1) was enacted (p. 3, *supra*).[42] Nor is the number of vessels barred by the state law necessarily *de minimis*. The record shows that, as of

[42] The controlling depth of Puget Sound is not a matter of record, and there is no fixed relationship between vessel deadweight tonnage and draft (A. 80). The record does show that the controlling depth of the Rosario Strait is at least 60 feet (A. 65), which, according to standard designs used by the United States at the 1973 International Conference on Marine Pollution, would accommodate tankers well in excess of 120,000 DWT (but less than 190,000 DWT) (A. 80).

December 1975, the world fleet contained 727 tankers over 125,000 DWT, representing 59 percent of the world's total oil tanker capacity, and an additional 344 vessels over 125,000 DWT were on order or under construction (A. 58).[43] While not all of these vessels are physically capable of navigating Puget Sound, some are, yet the Washington statute excludes them even though the Secretary has concluded that they might enter. The effect of Section 3(1) therefore is to nullify the Secretary's regulations and to intrude into a sensitive area of international concern in which Congress intended only the Secretary would act.[44]

As of January 31, 1976, approximately $197 million in public funds under the Construction-Differential Subsidy program of the Merchant Marine Act had been expended for the construction of American tankers in excess of 125,000 DWT (A. 59).[45] Eight additional vessels of that size are currently under

[43] ARCO's Cherry Point refinery is currently the only refinery in Puget Sound capable of accommodating fully loaded tankers with a draft of 55 feet or more (A. 50), but three of the five other oil companies with refineries on the Sound (Mobil Oil, Shell Oil, and Texaco) own and charter a substantial number of tankers in excess of 125,000 DWT (A. 53), and three (Mobil Oil, Shell Oil, and U.S. Oil & Refining) have plans under study to expand their docking facilities to accommodate tankers up to, respectively, 150,000, 200,000, and 125,000 DWT (A. 47–48).

[44] Each of the tankers in excess of 125,000 DWT that called at ARCO's Cherry Point refinery before enactment of Chapter 125 was a foreign-flag vessel (A. 31). As noted above (p. 27, *supra*), eighty-five percent of all tankers entering United States waters are of foreign registry.

[45] As of November 1, 1975, there were four tankers in the United States fleet over 125,000 DWT (A. 58).

construction contracts to be financed by $313.6 million under that program (MarAd Annual Report, Appendix I, p. 80).[46] Chapter 125's tanker ban threatens the success of the construction subsidy program by barring from the Sound vessels built at great public expense. If each coastal state were free to impose its own limitation on the size of vessels entering its ports, leaving prospective ship purchasers uncertain whether their vessels would be able effectively to engage in the trade for which they were intended, existing orders might be cancelled and new construction under the program might be substantially reduced. By contrast, the Secretary of Transportation is obliged to consult with the Maritime Administration before imposing general limitations on vessel size (see note 32, *supra*), and his regulations therefore can be expected to accommodate rather than jeopardize the goals of the subsidy program. For all these reasons, the district court correctly held that Chapter 125's tanker ban is preempted by federal law.[47]

[46] The cost of constructing one 150,000 DWT tanker is less than the cost of constructing two 75,000 DWT tankers (A. 63), and economies of scale permit large tankers to transport oil more cheaply than small ones (A. 63–64), resulting in a lower cost to the ultimate consumer.

[47] Appellants suggest (Br. 53) that the Deepwater Port Act of 1974, 33 U.S.C. (Supp. V) 1501 *et seq.*, which grants the coastal states a veto over the construction of nearby deepwater ports, indicates that Congress could not have meant in the PWSA to have deprived the states of the ability to ban tankers from already existing ports. But those two statutes, which were enacted at different times by different Congresses, do not purport together to constitute a fully integrated and comprehensive statutory scheme. The question of preemption in this case arises principally under

CONCLUSION

Chapter 125's tanker ban and its pilotage requirement with respect to enrolled and licensed vessels are preempted by federal law. The pilotage requirement with regard to registered vessels and the tug escort requirement are not preempted.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.
WILLIAM F. SHEEHAN, III,
Assistant to the Solicitor General.

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the PWSA, which directly regulates vessel traffic and design and—unlike the Deepwater Port Act—reserves no role for the states with respect to its regulatory subject matter (with specific exceptions regarding shoreside structures and pilotage of registered vessels). If, as we have argued, the PWSA represents a considered congressional judgment to preempt, directly or by agency regulation, such state statutes as the tanker ban at issue here, the later Deepwater Port Act would be relevant only if it exhibited a specific legislative intent to change the balance of federal-state power struck two years' earlier in the PWSA. Since the Deepwater Port Act does not even speak to the regulatory subject matter of the PWSA, it could not, and does not, exhibit such an intent.

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